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No. 73-1104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

THE HOOPA VALLEY TRIBE,
Petitioner,

v.

JESSIE SHORT, ET AL., and THE UNITED STATES,
Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENTS JESSIE SHORT ET AL. IN OPPOSITION TO PETITION OF HOOPA VALLEY TRIBE

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1. The Court need not reach respondents' jurisdictional challenge. Whatever status the petition of the Hoopa Valley Tribe might have standing alone, the Court indisputably has jurisdiction to grant the writ upon the petition of the United States filed on February 13, 1974.[1] Under Supreme Court Rule 21(4), the Hoopa Valley Tribe, made a party below, is "deemed" a party in this Court for purposes of seeking review on certiorari. In any case, this Court has broadly construed the provisions of 28 U.S.C. § 1255(1) (1970) to allow the grant of a petition for certiorari filed by a third party with status comparable to that granted the Hoopa Valley Tribe as intervenor. *See United States* v. *Mason*, 412 U.S. 391, 394 n.6 (1973).

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[1] Docket No. 73-1244.

2. Conveniently ignoring the provisions of the Act of June 17, 1892,[2] which decreed that the proceeds from the sale of the unallotted lands of the Klamath River Reservation were to be used exclusively for the benefit of "the Indians now residing on said lands and their children," respondents falsely state that all of the unallotted lands of the Hoopa Valley Reservation, as extended in 1891, "were retained in trust by the United States for the common benefit of all of the Indians of the reservation."[3] To the contrary, as long ago as 1904, it was expressly recognized by the Department of the Interior that the 1892 Act meant what it said, *i.e.*, that its primary purpose was to preserve the rights of the Indians located on the Klamath reservation" (*i.e.*, the Yuroks), and that "Congress in the act of June 17, 1892 *in effect recognized these Indians as a tribe, as well as their claims to the lands in the Klamath reservation . . .*" (Emphasis supplied) *Crichton* v. *Shelton*, 33 L.D. 205, 218-19 (1904).

Subsequently, the Secretary of the Interior, with Presidential approval, restricted allotments on the Connecting Strip "to the Indians located thereon"[4] and, many years later, instructed that allotments on the Square were to be "divided as equitably as possible among the Indians located thereon. . . ."[5] Thus, it is undisputed that the lands of the three parts of the Hoopa Valley Reservation (Klamath River Reservation, Connecting Strip and Square) were exclusively allotted to the Indian residents of each particular part at different times,[6] in different

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[2] 27 Stat. 52. Reproduced as Petitioner's Appendix C at 115-17.

[3] Brief of Respondents Jessie Short, *et al.* in Opposition to Petition of the Hoopa Valley Tribe (February 14, 1974) (hereinafter "Respondents' Brief") at 20.

[4] Petitioner's Appendix A (hereinafter "App. A") at 55.

[5] App. A at 59.

[6] App. A at 52-67.

amounts of acreage,[7] and in such manner as to deny the Hoopas of the Square individual rights in timberland comparable to those granted earlier to the Yuroks of the Addition.[8] The final result of this allotment program was that only 35 non-Hoopas received allotments on the Square, and they were long-time residents there. Similarly, only four Hoopas are known to have received allotments on the Klamath River Reservation and Connecting Strip, and they were long-time residents there.[9] This division of the Hoopa Valley Reservation was either directly commanded by Congress (in the case of the Klamath River Reservation) or followed naturally from

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[7] App. A at 56, 58, 61. Respondents falsely state that the Act of June 17, 1892 provided for the "allotment of homesites" on the Klamath River Reservation (Respondents' Brief at 11). This statement is totally misleading and completely ignores the findings of the court below that allotments on the Klamath River Reservation, pursuant to the 1892 Act, averaged 60 acres each (App. A at 56) and included timberland, whereas allotments on the Square were small agricultural allotments, "averaging 8 acres." (App. A at 61)

[8] Respondents' contentions (Respondents' Brief at 20 n.3) as to the effect of granting timber allotments to the Hoopas on the Square are highly misleading. A total of 406 persons eventually received allotments on the Square (365 allotments were approved in 1922-1923 (App. A at 61), and 41 additional allotments were approved as late as 1933 and 1950 (App. A at 66)). The grant of full 160 acre allotments to 406 persons would have yielded a total acreage of 64,960. Moreover, in 1932, just prior to the time when the allotment program was essentially completed there were 561 Indians residing on the Square who would either have been eligible for timberland allotments to fill out miniscule agricultural or grazing land allotments previously received or, if unallotted, for new allotments. (App. A at 62). If all of these had received 160 acre allotments this would have yielded a total of 89,760 acres. It should be noted that only 69,086 acres of the Square is "forest land" (EDA, The Hoopa Valley Reservation Hardwood Study Report, Clinic of Wood, at 11 (1968)) not all of merchantable quality, and it would not have been possible to give all eligible Hoopas timber allotments of anything close to 160 acres.

[9] App. A at 67. *See* Petition of Hoopa Valley Tribe (hereinafter "Petition") at 6 nn.15, 17 and at 7 n.21.

the Congressional intention implicit in the 1892 Act that the resident Indians of each tract of the reservation were entitled to retain substantive rights in their own particular area. It should be noted that such a division of substantive rights within one "reservation" was far from unique. Indeed, the so-called Mission Reservation provided specific precedent of a California Indian Reservation established pursuant to the 1864 Act and made up of a number of subreservations in which each band of Indians obtained exclusive substantive rights to the area which it theretofore had aboriginally occupied.[10]

3. Unable to refute our assertion that the decision of the Court of Claims would destroy the Hoopa Valley Tribe, and, indeed, arguing that a new "representative" organization should be formed, respondents allege that the Hoopa Valley Tribe is not a tribe at all, but rather a "select group of arbitrary composition" (Respondents' Brief at 16), formed by a "group of Indians on the reservation" (Respondents' Brief at 12) with no special rights. On the contrary, the record shows that the federally-recognized Hoopa Valley Tribe of Indians is the anthropological successor to the aboriginal Hoopa Tribe which, together with its Redwood allies, and a few Yuroks and other non-Hoopa Indian residents of the Square, were granted rights on the 12-mile Square, the original Hoopa Valley Reservation of 1864, and have endured there to this day.[11] They operate a modern tribal government,

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[10] *See* Petition at 13 n.38; Defendant's Exhibit (hereinafter "Def. Ex.") 55 at 21.

[11] One of the few California tribes with an overall chieftainship (Def. Ex. 144-5 at 582; *Cf.* App. A at 19-20), the Hoopas of the Square had a functioning tribal council as early as 1916 (App. A at 59-61). In 1933, they formed a Hoopa Business Council of Indians elected exclusively from residents of the 12-mile Square (App. A at 83). Membership in the Hoopa Tribe at that time (App. A at 83-84), as in the presently organized Hoopa Valley Tribe (App. A at 90-92) was not restricted to those purely of Hoopa blood. Trial judge Schwartz acknowledged that the Hoopa Business Council of

offering many typical tribal government services on the reservation.[12] We concede that the Hoopa Valley Tribe is not an absolutely pure tribe, in the sense of 100% descent from a single anthropological group, but it is essentially so, and is far from being an "arbitrarily composed" group, as respondents would have the Court believe.

Contrary to respondents' assertion (Respondents' Brief at 18), the Hoopas do not state or imply that all of their members reside on the Square. However, the truth is that while most respondents do not live on any of the three subreservations comprising the Hoopa Valley Reservation, most of the Hoopas do live on the Square.[13]

It is inescapable that the overwhelming majority voice of voters of any new organization formed to represent the Hoopas and Yuroks jointly will necessarily belong to the far more numerous off-reservation Yurok Indians—a fact respondents do not deny. It is ludicrous for respondents to suggest that control of the reservation would be surrendered by the off-reservation majority to the Indians of the reservation (Respondents' Brief at 18-19).

4. In an effort to minimize the deep-rooted ties of the Hoopa Valley Tribe to the Square, respondents erroneously state that at the time the original Hoopa Valley Reservation was established, "[t]he northern half of this twelve-mile-square tract, to the extent that it was inhabited, was occupied by Yuroks" (Respondents' Brief at 18). This is not true. Respondents ignore the established presence, in 1864, of Redwood and Chilula Indians,

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1933 was the "predecessor" of the Hoopa Valley Business Council (App. A at 88).

[12] *See* Petition at 9 n.27.

[13] According to current records of the Bureau of Indian Affairs, approximately 14% of respondents live on the Addition to the Hoopa Valley Reservation, as compared with approximately 63% of the Hoopa Valley Tribe who presently live within the limits of the 12-mile Square.

and other constituent Hoopa bands or allies,[14] who occupied the Bald Hills area, in and around Redwood Creek, in the northern portion of the Square.[15] Furthermore, the precipitous canyon area in the northern half of the Square was *Hoopa* aboriginal territory.[16]

More importantly, however, the trial judge found that at the time the Square was confirmed as a reservation by Executive Order in 1876, there were only 44 Yuroks [Klamath] Indians residing on the Square, as opposed to 511 Hoopas, or approximately 8% of the total Indian population (App. A at 29).[17] This apparently resulted

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[14] According to A.L. Kroeber, "[t]he Chilula, who constitute one larger ethnic group with the Hupa and Whilkut [Redwood], are almost indistinguishable from the Hupa in speech. . . ." [Kroeber, Handbook of the Indians of California (Def. Ex. 144-7) 137 (1925)]. These tribes of Athabascan linguistic stock are among the Indian groups comprising the present day Hoopa Valley Tribe of Indians which has always shared in the resources of the Square. App. A at 90-92.

[15] Def. Ex. 144-11 at 483, 519. Def. Ex. 144-4 at 266-67.

[16] Dr. Kroeber leaves no doubt as to Hoopa dominion over the north canyon area:

> "In spite of the proximity of a group of populous Yurok settlements at this confluence [of the Trinity and Klamath Rivers], *the canyon, or nearly all of it, belonged to the Hupa*, who now and then seem even to have built houses at two or three points along its course." (Emphasis supplied.) [Def. Ex. 144-7 at 128.]

While the trial judge ruled (erroneously we say) that the canyon of the Trinity near its junction with the Klamath "was native territory of the Yuroks" (App. A at 26), he never found that the northern half of the Square was inhabited exclusively by Yuroks.

[17] In marked contrast, this Court determined that the Yurok population on the Klamath River Reservation alone was approximately 2,500 in 1852, 900 in 1895, and 668 in 1910. *Mattz* v. *Arnett*, 412 U.S. 481, 488-89 (1973). The vast majority of the Tolowa Indians removed there in 1856 immediately returned to their former territory. App. A at 15. Thus, it is false to aver, as do respondents, that the Klamath River Reservation was never established as a reservation for the Yurok Indians (Respondents' Brief at 10). Indeed, this Court has specifically stated that the site of the Klamath

from the deliberate decision of Superintendent Wiley, who established the boundaries of the Square, to exclude, as far as practical, Yurok settlement thereon. For if Superintendent Wiley had extended the boundary of the Square in a northerly direction for merely another mile or two, large numbers of Yurok Indians would have been added to the population of the reservation.[18] However, this was unnecessary for the reason that the Yurok Indians were already residing in their ancestral homes along the Klamath River on their own reservation, the Klamath River Reservation, and on the Connecting Strip between the two reservations.[19] For many reasons it would have been foolish and perhaps dangerous to disturb this status quo.

It should be recalled that the Hoopa and Yurok Indians were of different linguistic stock and were historically antagonistic. Both tribes fought the government, as well as each other, to retain their aboriginal homes, and the Yuroks consistently returned to their homes along the Klamath River, even following a devasting flood which destroyed most of the arable land (App. A at 15-16). Furthermore, numerous proposals to remove large numbers of Yuroks to the Square were never carried out. (App. A at 27) Perhaps most revealing is the fact that the Yurok Indians of the Addition, as a group, showed no interest in the Square until its timber resources began to produce significant revenue.

River Reservation was "ideally selected for the Yuroks." *Mattz* v. *Arnett*, *supra* at 487.

[18] *See* the maps (submitted as Plaintiff's Exhibits 10H and 16) which show that the large Yurok settlements of Weitspus and Rlrgr at the confluence of the Klamath and Trinity rivers were definitely outside the boundary of the Square, and that, at most, only a small portion of the third settlement, Pekwtul, fell within the boundary.

[19] App. A at 36, 53-54.

It is unquestionably true that the same ethnic, social, economic and political considerations which convinced government officials in 1864 to maintain the separateness of the Hoopa and Yurok Indians, were just as compelling in 1891 when the reservation was extended,[20] in 1892 and thereafter when subreservations were recognized by Congress and the Secretary through the institution of separate allotment programs, and in 1958 when the Secretary upheld the Hoopas' rights on the Square, as they are today.

In any event, the Hoopa Valley Tribe has always recognized that a few Yurok and other non-Hoopa Indians resided on the Square from early times. These Indians and their descendants became Indians of the Square who are entitled to share, and have shared, equally in the resources of the Square. Such was the conclusion of the Deputy Solicitor in 1958, a conclusion which we contend is fully determinative of this case:

> "Each and every individual member of the many tribes or bands of California Indians was privileged after 1865 to settle upon this reservation [the Square]. None of them was required to do so. Those who accepted became vested with the full incidents of Indian title. Those who did not accept, and chose to remain where they were, or move elsewhere, cannot be properly regarded as being invested with en-

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[20] The Executive Order of 1891 did not disturb this separateness. Contrary to respondents' contention that the Hoopa Valley Reservation was extended in 1891 "in order to accommodate on this reservation the numerous Yurok Indians living nearby. . ." (Respondents' Brief at 10), this Court has found that the major concern of the government officials at that time was to prevent the Yuroks from losing the Klamath River Reservation to white settlement. *Mattz* v. *Arnett*, 412 U.S. 481, 502 (1973). *See also* App. A at 46. There simply was no need to consolidate the two tribes in order to protect the Yuroks from white encroachment, or to satisfy the four-reservation requirement of the 1864 Act. The prior establishment of the so-called "Mission Reservation" had so proven. *See* Petition at 13 n.38.

forceable rights thereon either in themselves or in their posterity.[21]

The controlling factor in the instant case is that unlike the few original non-Hoopa inhabitants of the Square who were entitled to share the Square's resources, respondents are, for the most part, Yurok Indians of the Addition, or their numerous descendants,[22] who neither settled on the Square nor otherwise associated with the Square's inhabitants, and who have already shared in the abundant resources of the Klamath River Reservation and the Connecting Strip,[23] from which the Hoopa Indians have never sought nor received any benefit whatsoever.

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[21] Appendix G at 131 (65 I.D. 59, 65 (1958)).

[22] App. A at 3. In fact, the trial judge held:

"This conclusion of fact as to the presence of Yuroks on the Square prior to white settlement does not, of course, support the claim of the present plaintiff Yuroks of the Addition, who were not introduced into the reservation until 1891. . . ." [App. A at 7.]

[23] The timber resources on the Addition were always regarded as plentiful and extremely valuable. *See Chrichton* v. *Shelton*, 33 L.D. 205, 216-17 (1904). During a more recent survey of conditions of Indian reservations throughout the United States, the Senate Committee on Indian Affairs received a memorandum from the Superintendent of the Hoopa Agency which stated, in part, that "[t]he land on the Klamath is still more rough than the Hoopa, but there is *more valuable timber in isolated tracts on that portion of the reservation*". (Emphasis supplied) Hearings on S.Res. 79 and 308 (70th Cong.), and S.Res. 263 and 416 (71st Cong.), and S.Res. 323 (72d Cong.) Before a Subcomm. of the Senate Comm. on Indian Affairs, 72d Cong., 1st Sess., pt. 29, at 15545 (1932). *See also* Petition of the United States for a Writ of Certiorari, Docket No. 73-1244 (February 13, 1974) at 5 n.3.

CONCLUSION

The Hoopa Valley Tribe respectfully requests that its petition for a writ of certiorari to the United States Court of Claims be granted.

Respectfully submitted,

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